UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

B.P., H.A., and S.H., individually, and on behalf of all others similarly situated, Plaintiffs,	)	
v.	)	No. 2:23-cv-00071-TRM-CRW
CITY OF JOHNSON CITY, TENNESSEE, et al., Defendants.	)	

SUPPLEMENTAL BRIEFING ORDERED BY COURT (DE 461)

Defendants do not suggest that the Court should disregard Sixth Circuit precedent. Defendants' Motion (DE 416) was intended to be broader than class certification, though the class certification motion was certainly the impetus that brought the issue to a head. While the Court's recent Order (DE 461) denies as premature the portion of Defendants' Motion insofar as the Motion sought exclusion of Plaintiffs' use of the Daigle report at trial, the Defendants' Motion did seek that relief, which conclusion Defendants contend should thereby bar the use of the report at class certification, even under *Lyngaas*. Separately, the *Lyngaas* holding appears to have been sharply limited by the Sixth Circuit just in the last week, the day after Defendants' Reply (DE 457) was filed on November 21. *See In re Nissan N. Am., Inc. Litig.*, 2024 WL 4864339, at *10 (6th Cir. Nov. 22, 2024), discussed *infra*.

In *Lyngaas*, the Sixth Circuit determined that, for nonexpert evidence, a district court was not *required* to determine at the class certification stage whether evidence would be admissible at trial, and a district court was not required to exclude evidence on the purely technical grounds of *authentication* at issue in *Lyngaas*.[1]

[1] *Lyngaas* suggested that when the trial court *later* determined the nonexpert evidence at issue to be inadmissible at the trial, that the proper route then would have been to move to decertify the class, rather than challenge the initial certification on appeal as the *Lyngaas* defendants did: "The defendants, however, did not move to decertify the class after the district court found at the bench trial that Lyngaas's evidence of the summary-report logs was inadmissible;

Defendants assert that Plaintiff's improper use of a subsequent remedial measure is not a technical evidentiary deficiency such as authentication, but is a substantive one. In other words, *Lyngaas* did not hold that a district court affirmatively *should* consider substantively inadmissible evidence at class certification stage, only that the court was not *required* to strictly apply the Rules of Evidence in a technical way to exclude nonexpert evidence at that stage.

As mentioned above, on November 22, 2024, the day after Defendants' Reply was due and filed, the Sixth Circuit issued a new opinion concerning the use of expert evidence at the class certification stage, requiring for the first time an approach by some other circuits mandating that district courts should substantively apply Rule 702 of the Rules of Evidence and *Daubert* to expert evidence at the class certification stage. *In re Nissan N. Am., Inc. Litig.*, 2024 WL 4864339, at *10 (6th Cir. Nov. 22, 2024). In so doing, the Sixth Circuit rejected the Plaintiffs' interpretation of *Lyngaas* that the district court must not make evidentiary determinations at the class certification stage:

> The plaintiffs argue that *Lyngaas v. Curaden Ag* forecloses this approach. 992 F.3d 412 (6th Cir. 2021). It does not. In *Lyngaas*, we held that the evidence rules **governing authentication** do not **necessarily** apply at the class-certification stage. *Id*. at 428–29. But we addressed "nonexpert evidence" in making the point. *Id*. Unlike the rules of authentication, *Daubert* "make[s] certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Id. at *10 (emphasis added).

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rather, they argue now that the district court improperly certified the class and, as discussed later, improperly established a claims-administration process based on the inadmissible evidence." *Lyngaas* at 428.

Defendants understand the *Lyngaas* holding to be that the Court is not *required* to make that determination concerning nonexpert evidence at the class certification stage, and further should not necessarily disregard evidence at the class certification stage on highly technical grounds such as authentication. But if the Court *has* determined that the evidence is inadmissible at trial (as Defendants' Motion sought), or inadmissible on substantive grounds (such as subsequent remedial measure as opposed to authentication), then Defendants contend the *Lyngaas* holding does not foreclose the Court's exclusion of the Daigle report at class certification stage. These conclusions appear consistent with the Sixth Circuit's very recent discussion of *Lyngaas* in *In re Nissan*.

Defendants contend that the Sixth Circuit's new case, *In re Nissan*, makes clear that a district court *may* consider evidentiary objections, it just does not "*necessarily*" have to as to technical matters on nonexpert evidence. Moreover, *In re Nissan* appears consistent with Defendants' view that *Lyngaas* is limited to application of technical rules such as authentication, as opposed to substantive evidentiary rules such as Rule 702, or as Defendants contend, Rule 407 concerning subsequent remedial measures.

Defendants also note that even if *Lyngaas* is considered in a vacuum and presumed to require a district court within the Sixth Circuit to disregard evidentiary objections entirely at the class certification stage, there appears to be a Circuit split on this issue at least as to the extent to which the Rules of Evidence strictly apply, and Defendants must preserve this issue by respectfully persisting in the objection. The Fifth Circuit has stated that class certification "must be made based on adequate admissible evidence." *Unger v. Amedisys Inc*., 401 F.3d 316, 319 (5th Cir. 2005) (later rejected by the Sixth Circuit in *Lyngaas*); *see also Mars Steel Corp. v. Cont'l Bank N.A*., 880 F.2d 928, 938 (7th Cir. 1989) (holding the FRE apply to FRCP 23(e) class settlement fairness hearings because those proceedings are not listed as an exception in FRE 1101(d)); *Allen v. Ollie's Bargain Outlet, Inc.,* 37 F.4th 890, 899 (3d Cir. 2022) (expressly declining to decide the question of whether nonexpert evidence must be admissible at the class certification stage); *but cf. Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1003-06 (9th Cir. 2018).

District courts have also required evidence be admissible in many instances. *See e.g.*, *Sicav v. Wang*, 2015 WL 268855, at *6 (S.D.N.Y. 2015) ("[To conduct a rigorous analysis of the FRCP 23 requirements] the Court must ensure that there is a basis in admissible evidence for each factual representation made in support of class certification to assure that a class is not certified based on conjecture as opposed to provable facts."); *see also Lujan v. Cabana Management, Inc*., 284 F.R.D.

50, 64 (E.D.N.Y., 2012) ("After reviewing Second Circuit case law addressing the evidentiary standards applicable to Rule 23 motions, this Court is of the opinion that the Second Circuit would require that such declarations be admissible (i.e., based on personal knowledge and either non-hearsay or information subject to hearsay exceptions)").

Similarly, district courts have disallowed affidavits not based on personal knowledge, applying Rule 602:

> The demand for a rigorous analysis of the class qualifying factors at the critical class certification stage makes it important that the evidence to be used in making that decision be reliable. The Federal Rules of Evidence teach that personal knowledge is the predicate of reliability. Fed. R. Evid. 602. Of course, those rules "apply to proceedings in United States courts," subject to certain exceptions not applicable here. Fed. R. Evid. 101; Fed. R. Evid. 1101. A motion for class certification is, without doubt, such a proceeding. Thus, Fed. R. Evid. 602 applies to testimony, whether *ore tenus* or by affidavit or declaration, and it says in clear terms:
>
> > A witness *may testify* to a matter *only if* evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.
>
> Fed. R. Evid. 602 (emphasis added). Personal knowledge is just as important in conducting the rigorous analysis required for class certification as is personal knowledge in deciding a summary judgment motion.

Soutter v. Equifax Information Services LLC, 299 F.R.D. 126, 131 (E.D. Va. 2014).

Defendants further contend that the Sixth Circuit's recent decision, *In re Nissan*, itself limits the *Lyngaas* holding to nonexpert evidence, and creates a new rule in the Sixth Circuit of proper foundation for expert testimony at the class certification stage. Based on this post-briefing change in the law, Defendants further object to the use of the Daigle report under Rule 702 and *Daubert*, as both without foundation and also as unreliable (because rendering an expert opinion

is not what Daigle was engaged to do, and so Mr. Daigle factually did not engage in the scope of work necessary to form such an opinion).[2]

However, this objection pursuant to *In re Nissan* does in fairness appear to be premature in light of the Court's Order permitting Plaintiffs to refile their class certification motion, as Plaintiffs may attempt to lay a foundation with their revised motion.

Thus, Defendants would revise their earlier position in response to Plaintiffs' email, in light of this new Sixth Circuit opinion, and agree that this entire Motion would be appropriate to re-file following Plaintiffs' revised motion for class certification, so that the Court can consider the subsequent remedial measures objection and the *Daubert* and foundation objections all at one time.

CONCLUSION

For the foregoing reasons, and in light of the November 22, 2024 decision from the Sixth Circuit of *In re Nissan*, the Court should reserve ruling on the subsequent remedial measures objection until after the Plaintiffs file a revised motion for class certification, and Defendant raises any *Daubert* challenges based on Plaintiffs' foundation (or lack thereof) at that time, resolving all objections at once.

[2] Defendants request an additional opportunity to brief these *Daubert* and foundation issues raised by the Sixth Circuit's new opinion. The Court's Order requiring supplementation by Sunday, December 1, over the Thanksgiving holiday, does not provide the parties adequate opportunity to fully brief the issues that the Sixth Circuit's new opinion raises, that decision coming after the prior briefing was completed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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This the 1st day of December, 2024.

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